Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1231 & 73-1234

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION FOR THE UNION RESPONDENTS

The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at pp. 2-3, A1-A92 of the petition in No. 73-1231 (filed by Linden

Lumber Division), and at pp. 1-4, 23-193 of the petition in No. 73-1234 (filed by the NLRB).[1]

QUESTION PRESENTED

Sections 8(a)(5) & 9(a) of the National Labor Relations Act provide that it is an unfair labor practice for an employer to refuse to recognize "the representative • • • designated or selected • • • by the majority of the employees in a[n] • • • appropriate • • • unit." The question raised in the petitions is:

Whether an employer who has not committed substantial violations of §§ 8(a)(1)-(4) of the NLRA has an absolute privilege to refuse to recognize a union, and an absolute right to require that union to prove its majority status by petitioning for a Board election and certification, no matter how convincing the union's showing of majority support may be.

ARGUMENT[2]

1. The petitions in these cases do *not* "present a question

[1] Since they raised the same question in essentially parallel settings, the Court of Appeals consolidated two petitions for review of separate Board decisions, one filed by Truck Drivers Union Local No. 413 and involving Linden Lumber Division, the other filed by the Textile Workers Union and involving the Wilder Mfg. Co. (NLRB Pet. App. p. 24.) Both petitions for certiorari seek review of the resulting decision of the court below. We therefore respond to both in this brief.

[2] Since, as we show below, the Court of Appeals did not determine when an employer must recognize an uncertified union, but simply held that the privilege not to do so is not absolute, the question presented here is wholly abstract. For this reason and since the Board's statement of the case (NLRB Pet. pp. 4-11) follows the outline of the facts as stated in its decisions (which the Unions accepted in the court below), we do not restate the case.

which was left open in [*NLRB*] v. *Gissel Packing Co.*, 395 U.S. 575," (cf. NLRB Pet. p. 11); they present a question which was foreclosed by Congress in enacting the 1947 amendments to the National Labor Relations Act. The Court of Appeals' answer to that question is the one decreed by Congress, and there are no conflicting decisions in this Court or in the other courts of appeals. Additionally, the decision below is interlocutory in nature. It imposes no present obligation on either Linden Lumber (the petitioner in No. 73-1231), or Wilder Mfg. Co. (the other employer party before the Board, which has not filed a petition). Nor does that decision disturb the Board's prerogative to determine in the first instance the respective rights and obligations of the employer and union parties. For, the Court of Appeals only ordered a "remand to the Board to reconsider what option, consistent with the statute, it wishes to follow," (NLRB Pet. App. p. 50). Thus, these immediate petitions for further review by this Court prior to that process of reconsideration are both insubstantial and premature.

2. Two issues of law were presented to the court below. First, whether the Board's " 'voluntarist' view of the duty to bargain, [*viz*, that] absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union," (NLRB Pet. App. p. 35), is correct. Second, if not, under what circumstances an employer violates the Act by refusing recognition and requiring the union to prove its majority status by petitioning for a Board election and certification. The Court of Appeals rejected the Board's "voluntarist view of the duty to bar-

gain," but declined to pass on the second and ultimate question until it had been addressed by the Board in light of the policy of the Act as Congress wrote it, rather than evaded by that agency's determination to effectuate its own notions of sound policy. (See NLRB Pet. App. pp. 36-37, 47, 50.)

(a). Rejection of the Board's "voluntarist view of the duty to bargain" is required by the language of §§ 8(a)(5) & 9(a) as informed by the legislative history which explains the place of these provisions in the overall statutory scheme.

Section 8(a)(5) of the Act, provides:

> "It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 9(a), in turn, states:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *"

Thus, the Act as it stands today, in precisely the language utilized by the Wagner Act before it, imposes a duty on employers to recognize "the representative * * * designated or selected * * * by the majority of the employees in a[n] * * * appropriate * * * unit." Since Congress has not

> "specif[ied] precisely how that representative is to be chosen, it was early recognized that an employer

> had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.' Almost from inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation." (*NLRB* v. *Gissel Packing*, 395 U.S. 575, 598.)

In 1947, the Taft-Hartley Conference Committee considered ,and rejected, a proposal which had passed the House, and which would have limited § 8(a)(5) to situations in which "an employer had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9.' Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess. (1947)," (*Gissel*, 395 U.S. at 598. The Conference Committee explained that:

> "The conference agreement * * * follows the provisions of existing law * * * in the case of section 8(5) * * * which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)." (H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. p. 41, 1 Leg. Hist. of the LMRA, p. 545.)

And, as this Court appreciated in *Gissel* (see 395 U.S. at 598), the then "existing [§ 8(a)(5)] law * * * follow[ed]" by Congress in 1947 was that which had been stated by Judge Charles Clark in the leading case of *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (C.A. 2):

> "The contention that bargaining was not mandatory until the Board had accredited Local 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents

> convincing evidence of majority support. *National Labor Relations Board* v. *Remington Rand, Inc.*, 2 Cir., 94 F.2d 862, 868, certiorari denied 304 U.S. 575, 585. We do not mean that respondent had to bargain with anyone claiming to represent a majority, but adequate proof tendered by the claimant could not in good faith be ignored."

Finally, to further underline the point that Board elections are a means for resolving "bona fide disputes as to the existence of the required majority," (*Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 69), and not as the House would have provided, an end in themselves, the 1947 Congress added § 9(c)(1)(B) to the Act which provides employers a narrower right than they sought, *viz*, to file their own petition for a representation election where they "have *reasonable grounds* for believing that labor organizations claiming to represent the employees are really not the choice of the majority," (S. Rep. No. 105, 80th Cong., 1st Sess., 10-11; 1 Leg. Hist. of the LMRA, p. 416; emphasis added).

What Congress did and did not do in 1947 thus leaves no room for the petitioners' argument that there is an employer privilege to refuse recognition and to require the union to prove its majority status by petitioning for a Board election and certification where the union has presented "convincing evidence of majority support," (*Dahlstrom Metallic Door*, 112 F.2d at 757). For while employers sought a limitation of the duty to bargain which would have required unions to petition for an election no matter how strong the union's proof of majority, they were "unable to secure its embodiment in enacted law," (*Local 1976 Carpenters* v. *NLRB*, 357 U.S. 93, 100). And while the present

Board shares the belief that according employers such a limitation is sound policy, the contrary "policy of Congress * * * that we find * * * in the statute * * * cannot be defeated by the Board's policy," (*Local 1424 Machinists* v. *NLRB*, 362 U.S. 411, 428).

(b). In *Gissel* this Court squarely recognized that Congress had foreclosed the question the petitions seek to raise by stating:

> "[W]e hold that the 1947 amendments did not restrict an employer's duty to bargain under § 8(a)(5) solely to those unions whose representative status is certified after a Board election." (395 U.S. at 600; footnote omitted.)

But as the Court of Appeals recognized, while:

> "These statutory provisions [§§ 8(a)(5), 9(a) & 9(c)(1)(B)] plainly contemplate employer duty of recognition even in the absence of election, and give a safeguard to the employer who has doubts about majority status by assuring him the right to file his own petition for an election [, t]here is no clear cut answer * * * either in the text of the statute or the legislative history, to the question of when and in what circumstances an employer must take evidence of majority support as 'convincing.'" (NLRB Pet. App. p. 37.)

It is precisely because the court below did not attempt to provide a definitive answer "to the question of when and in what circumstances an employer must take evidence of majority as 'convincing'," that this case does not, as the Board claims, present the question reserved in *Gissel*. That reserved question was whether a union has a "right to rely on cards as a freely interchangeable substitute for

elections where there has been no election interference," (395 U.S. at 601 n. 18). This reservation was the product, and reflected limited acceptance, of a background of scholarly comment (see *id.* at 602 n. 19), and court of appeals' decisions (see *id.* at 602-610), which raised substantial, albeit sometimes overstated (*id.* at 602), grounds for regarding authorization cards, *standing alone*, as less than perfectly reliable indications of majority support.

The focus of this Court's attention in *Gissel* was not on the full extent of the obligations created by § 8(a)(5) standing alone, but on a remedial question concerning the scope of § 10(c), *viz*, "the appropriateness of a bargaining order as a response to violations of § 8(a)(5) as well as §§ 8(a)(1) and (3)," (395 U.S. at 595). In contrast the question of whether as a matter of substantive § 8(a)(5) law employers have a duty to recognize a union which presents authorization cards is one aspect of the entirely distinct problem of identifying the "indicators of employee desires," (*id.* at 601), which have proved in the light of evolving practical experience to be sufficiently reliable so as to serve as a proper predicate for a bargaining relationship, and those which have proved to be unreliable. The present cases, which do not involve authorization cards standing alone, but rather authorization cards backed by recognitional strikes by the card signers, present another aspect of that problem.

Following this Court's lead in *Gissel*, the court below concluded that this issue, in all its ramifications, should be dealt with in the first instance by the Board. For, in contrast to the threshold question that court did answer, this question is intensely practical and has not been dealt with

in terms by Congress. The Court of Appeals, therefore, refused the bargaining orders the Unions had sought, and instead ordered a "remand to the Board to reconsider what options consistent with the statute it wishes to follow," (NLRB Pet. App. p. 50). Until the Board complies with that mandate the process of litigating elucidation which this Court set in motion in *Gissel* cannot even begin. Thus, at this time, as at the time *Gissel* was decided, the question left open in that case is not ripe for decision.[3]

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[3] Despite the holding of *Gissel*, stated at 395 U.S. at 600 and quoted above, which affirms our understanding of the force of the 1947 amendments, the Board seeks to create the impression that the question reserved in *Gissel* was "whether a bargaining order based on cards *or some other showing of employee support other than certification in a Board election* 'is ever appropriate in cases where there is no interference with the election processes' [395 U.S.] at 595, see also *id.* at 601, n. 18," (NLRB Pet. App. p. 12; emphasis added.) The italicized portion of the foregoing finds no basis in this Court's language in n. 18 of *Gissel*, the pertinent portion of which we set out in the text. And the Board has taken out of context what this Court did say at 395 U.S. at 595. The quoted phrase in the petition is part of the paragraph concluding a discussion in which the Court stated that it put "aside * * * the Union's arguments * * * [that the] right to rely on cards * * * should be * * * correspondingly more expanded than the Board would have us rule * * *," in order to consider "the points of difference between the employers and the Board," *viz*, whether authorization cards alone can support a bargaining order where the employer has committed substantial violations of §§ 8(a)(1)-(4). (*Id.* at 594-595.) When that portion of the opinion is read in full and against the background of the passages at 395 U.S. at 600 & 601, n. 18, there can be no doubt that this Court did not intend to reopen the question that Congress had decided in 1947, but only to leave open that which the legislature (and the court below) have left open.

CONCLUSION

For the above stated reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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No opposition to the petition for a writ of certiorari was submitted by the National Labor Relations Board.